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In The

Supreme Court of the United States

October Term, 1995

FULLY INFORMED JURY ASSOCIATION, et al.,

Petitioners,

v.

COUNTY OF SAN DIEGO, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pp

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly determined that general orders issued by a state court were constitutionally permissible. The general order prohibited certain communication "tending to influence, interfere or impede the lawful discharge" of a trial juror's duties, and removed all newsracks from the sidewalk in front of the court building.

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TO THE HONORABLE SUPREME COURT:

Defendant/respondent County of San Diego, a political subdivision of the State of California, submit this brief in opposition to the petition for a writ of certiorari submitted by plaintiffs/petitioners Fully Informed Jury Association, et al.[1]

INTRODUCTION

Petitioners, the Fully Informed Jury Association, et al., seek review of an unpublished opinion of the Ninth Circuit Court of Appeals upholding the constitutionality of two general orders issued by the Superior Court of the State of California, sitting in San Diego County. Respondent County of San Diego respectfully requests that the petition be denied.

STATEMENT OF THE CASE[2]

Petitioners challenge the constitutionality of two General Orders issued by the state courts. General Order 102093, enacted by the Superior Court in 1993, prohibits

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[1] The respondent does not contest the petitioners' statement of jurisdiction or reference to the constitutional provisions involved.

[2] As explained more fully below, the petition contains material misstatements of fact. Sup. Ct. R. 15.2. Several of the misstatements are egregious, particularly petitioners' repeated assertion that the General Orders in question apply only to their jury nullification materials.

> "[t]he distribution or attempted distribution of any written materials tending to influence, interfere or impede the lawful discharge of the duties of a trial juror, and communication or attempt so to communicate with any person summoned, drawn or serving as a trial juror in these courts for purposes of so influencing, interfering or impeding the lawful discharge of the duties of a trial juror in or within 50 yards of any public entrance to"

the courthouse. Petitioner's Appendix C, p. 21a. General Order 102093 is a concise unambiguous attempt to control communication that interferes with or obstructs the lawful administration of justice. Contrary to petitioners' repeated misstatement, Order 102093 does not apply solely to their written jury nullification materials. *Cf.* Petition pp. (i), 3, 11. Order 102093 applies to all communication "influencing, interfering or impeding the lawful discharge of the duties of a trial juror."

The second order, General Order 2-14-94, commands that all

> "vendors and distributors of newspapers distributed from newsracks currently placed on the sidewalk bordering the front entrance of the San Diego County Courthouse . . . shall remove said newsracks to another location" within two weeks.

Petitioner's Appendix D, p. 24a. The preamble of that Order discusses how the newsracks interfere with safe passage to and from the courthouse, cause clutter and congestion and "detract from the dignity and appearance of San Diego County's main House of Justice." *Id.*, at 23a.

In October 1994, the district court granted respondents' motion to dismiss and denied petitioners' request to enjoin enforcement of the two General Orders. Petitioners' Appendix B. Petitioners timely appealed to the Ninth Circuit, which affirmed the district court's judgment in February 1996. Petitioners' Appendix A. The Ninth Circuit panel separately analyzed the two General Orders, concluding that both were constitutionally proper under the appropriate balancing tests.[3] This Petition followed.

REASONS TO DENY CERTIORARI

I. Petitioners Offer No Justification to Hear this Case Under the Supreme Court Rules

Petitioners fail to identify any compelling reason for this Court to hear this case. Sup. Ct. R. 10 [certiorari will be granted only for compelling reasons]. The Supreme Court Rules offer several situations under which this Court may grant a petition for certiorari. *Id.* None are present here.

Petitioners offer no case at either the federal or state level in conflict with the result reached by the Ninth

[3] Petitioners again misstate the record in discussing the Ninth Circuit's decision. The Ninth Circuit did *not* rule that General Order 102093 was a content-based regulation on speech. *Cf.* Petition p. 11. The Ninth Circuit ruled that General Order 102093 was constitutionally proper "[e]ven assuming [it] is a content-based restriction on political speech in a public forum, and so entitled to the most exacting scrutiny" by the court. Petitioners' Appendix A, p. 2a.

Circuit, and none are known to respondents. Sup. Ct. R. 10(a). Petitioners do not even suggest that the Ninth Circuit's ruling conflicts with any federal or state precedent.

Further, the Ninth Circuit's ruling cannot be said to implicate an important federal question that has not been, but should be, settled by this Court. Sup. Ct. R. 10(b). The issues petitioners raise involve well-settled areas of First Amendment jurisprudence; indeed, as discussed below, one of the regulations at issue here is strikingly similar to the regulation this Court approved over thirty years ago in *Cox v. Louisiana*, 379 U.S. 559 (1965).

II. General Order 102093 is Constitutionally Proper

Petitioners assert that General Order 102093 applies only to their political speech, and thus label the order a content-based regulation. This misstates the record. Order 102093 prohibits

> "distribution [of] written materials tending to influence, interfere or impede the lawful discharge of the duties of a trial juror . . . in or within 50 yards of any public entrance to"

the courthouse. This is a content-neutral restriction. The Order applies to *any* materials that have the proscribed effects, whether the materials are from petitioners, any plaintiff, any defendant, or any other person or group which seeks to "influence, interfere or impede the lawful discharge of the duties of a trial juror." *See Boos v. Barry*, 485 U.S. 312, 320 (1988) [content-neutral restrictions are "those that are justified without reference to the content

of the regulated speech"]; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Ninth Circuit did not rule on the question of whether Order 102093 was content-neutral. *Cf.* Petition p. 11. Rather, the court *assumed* that the regulation was content-based and found it permissible even under this "most exacting scrutiny." Petitioner's Appendix A, p. 2a. Content-based restrictions are not *per se* invalid but

> "must be subjected to the most exacting scrutiny. Thus we have required the State to show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."

Boos, supra, 485 U.S. at 321 [citations omitted]. Even under this most exacting degree of constitutional scrutiny, the prohibitions posed by Order 102093 are constitutionally proper.[4]

It is difficult to conceive of a more compelling state interest under our system of government than the integrity of the judicial system. As this Court has stated,

> "[t]here can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which [First Amendment activities] near a courthouse might create. Since we are committed to a government of laws and not men, it is of the utmost importance that the administration of justice be absolutely fair and

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[4] Obviously, if the regulation is constitutionally permissible under the most exacting level of scrutiny, it will be constitutionally proper under the less strict test applied to a content-neutral regulation.

> orderly. This Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy. . . . A state may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence."

Cox v. Louisiana, 379 U.S. 559, 562 (1965).

Petitioners attempt to distinguish *Cox* by asserting that the statute at issue there applied only to picketing. Petition, p. 14. This purported distinction is immaterial. The *Cox* statute indeed applied to pickets and parades "in or near" a courthouse. *Id.* at 560. The statute, however, only applied to such communicative activity "with the intent of interfering with, obstructing or impeding the administration of justice or with the intent of influencing any judge, juror, witness or court officer." *Id.* The proscription against communications influencing, interfering with or impeding the judicial process approved in *Cox* is the same proscription presented in General Order 102093.

Moreover, General Order 102093 is both more narrow and specific than the statute upheld in *Cox*. Where the *Cox* statute proscribed certain communications with "any judge, juror, witness or court officer," General Order 102093 applies only to communications with jurors. Where the *Cox* statute proscribed certain communication "in or near" the courthouse, General Order 102093 applies only within fifty yards of a public entrance to the courthouse.

In other words, this Court has already addressed the First Amendment questions allegedly posed by General Order 102093. Petitioners' petition for *certiorari* does not

implicate an important federal question that has not been, but should be, settled by this Court. Sup. Ct. R. 10(b). General Order 102093 is constitutionally proper because it serves a compelling state interest and is narrowly drawn to achieve that end.

III. General Order 2-14-94 is Constitutionally Proper

Petitioners characterize General Order 2-14-94 as a content-based regulation. Petition, p. 17. Petitioners again misstate the record. General Order 2-14-94 applies to all newsracks placed on the sidewalk bordering the courthouse, regardless of content. It is therefore content-neutral. *See Ward*, 491 U.S. at 791 [regulation "that serves purposes unrelated to the content of expression is deemed neutral even if it has an incidental effect on some speakers or messages but not others"].

General Order 2-14-94 also "leave[s] open ample alternative channels for communication of the information." *Id.* The Order applies to newsracks only on the sidewalk bordering the front entrance to the courthouse. Vendors and distributors remain free to move their newsracks virtually anywhere else. Likewise, the Order does not restrict the right of vendors to sell or distribute publications in a manner that does not employ newsracks. The Order also in no way regulates other forms of expressive conduct that do not involve publications in newsracks.

Finally, the Order is "narrowly tailored to serve a significant governmental interest." *Id.* A regulation is narrowly tailored so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799.

> "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by a less speech-restrictive alternative."

Id. at 800. Safe public access to the courthouse and the "dignity and appearance" of the "County's main House of Justice" are significant governmental interests, as are avoiding clutter and congestion in front of the building.

In short, this Court has addressed the federal questions raised in petitioners' petition for *certiorari* regarding General Order 2-14-94. The Order is a valid time, place, and manner restriction under applicable First Amendment principles. There is no compelling reason for this Court to review the newsrack regulation.

CONCLUSION

For the foregoing reasons, respondent County of San Diego respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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